

NATIONAL LABOR RELATIONS BOARD
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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

AMAZON.COM SERVICES LLC and
AMAZON LOGISTICS, INC.,

Plaintiffs,

v.

NATIONAL LABOR RELATIONS
BOARD, *et al.*,

Defendants.

Case No. 2:24-cv-09564-SPG-MAA

**DEFENDANTS' OPPOSITION TO
PLAINTIFFS' APPLICATION FOR
PRELIMINARY INJUNCTION**

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1 This case follows a recent trend of litigants who, rather than defend themselves
2 on the merits in an administrative proceeding, take to federal district court with the
3 extraordinary claim that every such administrative proceeding is unconstitutional.
4 Plaintiffs Amazon.com Services LLC and Amazon Logistics, Inc. (together,
5 “Amazon”) are not entitled to preliminary relief halting the congressionally mandated
6 procedure for resolving labor disputes, as Amazon has not satisfied any of the
7 requirements for obtaining such relief. Accordingly, Amazon’s Application for a
8 Preliminary Injunction should be denied.

9 **FACTS**

10 The National Labor Relations Board (“NLRB”)¹ is the exclusive federal agency
11 designated to protect employee rights under the National Labor Relations Act
12 (“NLRA” or “the Act”), 29 U.S.C. § 151, *et seq.* The NLRA divides the powers of the
13 General Counsel, which are prosecutorial, from those of the five-seat Board and its
14 administrative law judges (“ALJs”), which are adjudicative.²

15 Under Section 10 of the NLRA, the Board has final authority to adjudicate
16 allegations that an employer or union has committed an unfair labor practice (“ULP”).
17 *Id.* § 160. Such allegations arise out of charges filed by members of the public; formal
18 proceedings do not commence unless and until the NLRB’s General Counsel, or her
19 delegate, finds merit to the charge and issues a complaint. *Id.* §§ 153(d), 160(b). Such
20 complaints are usually accompanied by a notice of hearing before an ALJ. NLRB
21 Casehandling Manual, Part One § 10268.1 (June 2024), available at
22 <https://www.nlr.gov/guidance/key-referencematerials/manuals-and-guides>.
23 Alternatively, a hearing may also be held “before the Board or a member thereof.” *Id.*

25 ¹ “NLRB” refers to the agency as a whole; “Board” refers to the five-member
26 adjudicative body.

27 ² The General Counsel also exercises “general supervision over all attorneys employed
28 by the [NLRB] (other than [ALJs] and legal assistants to Board members) and over
the officers and employees in the regional offices.” 29 U.S.C. § 153(d).

1 § 160(b). This administrative process is the exclusive mechanism provided by
2 Congress to enforce most of the NLRA’s proscriptions against unfair labor practices.
3 NLRB ALJs are appointed in accordance with the U.S. Constitution, Art. II,
4 § 2, cl. 2, the Civil Service Reform Act, 5 U.S.C. § 3105, and the NLRA. 29 U.S.C.
5 § 154(a); *WestRock Services, Inc.*, 366 NLRB No. 157, slip op. at 3 (2018). In presiding
6 over unfair-labor-practice trials, NLRB ALJs’ main role is to oversee the development
7 of an administrative record and ultimately issue a “proposed report, together with a
8 recommended order” to the Board. 29 U.S.C. § 160(c); *see generally* 29 C.F.R.
9 § 102.35(a) (enumerating powers of NLRB ALJs). Once an ALJ issues a decision and
10 recommended order, parties may file “exceptions” on any contested issue, asking the
11 Agency’s five-seat Board to rule upon the matter. 29 C.F.R. § 102.46(a). After any
12 timely exceptions are filed, the Board will consider and issue a final decision and
13 order, either adopting the ALJ’s decision with or without modifications, or issuing its
14 own final decision, as necessary. 29 U.S.C. § 160(c); 29 C.F.R. § 102.48(b). In doing
15 so, the Board is not bound to accept either the ALJ’s findings of fact or conclusions
16 of law. 29 U.S.C. § 160(c). Indeed, the Board has explicit statutory authority to take
17 additional evidence upon notice to the parties. *Id.* If, however, no exceptions are
18 timely filed, the Board issues a pro-forma order adopting the ALJ’s findings,
19 conclusions, and recommended order. 29 C.F.R. § 102.48(a). Even if no exceptions
20 are filed, the Board may nonetheless modify the judge’s recommended order, such as
21 to conform to the Board’s current remedial practices. *See, e.g., Cooling for Less, Inc.*, Case
22 28-CA-105006, 2014 WL 1871305, at *1 n.1 (2014) (substituting a new notice to
23 employees for the one recommended by the ALJ). And a Board order automatically
24 adopting an ALJ’s decision in the absence of exceptions is not precedential. *N.Y.*
25 *Paving, Inc.*, 371 NLRB No. 139, slip op. at 6 n.11 (2022), *enforced per curiam*, No. 22-
26 1266, 2023 WL 7544999 (D.C. Cir. Nov. 14, 2023).

27 The process for removing an ALJ employed by the NLRB—and indeed, by any
28 other federal agency—is defined by statute. With a few exceptions, ALJs may be

1 removed “only for good cause established and determined by the Merit Systems
2 Protection Board [(“MSPB”)] on the record after opportunity for hearing before the
3 [MSPB].” 5 U.S.C. § 7521(a). Removing an NLRB ALJ is a two-step process: the
4 Board must bring an action to remove an ALJ, and the MSPB must determine that
5 good cause for removal has been established. The MSPB has found “good cause” to
6 remove or suspend ALJs for several reasons, including insubordination, misconduct,
7 and poor performance. *E.g.*, *SSA v. Carr*, 78 MSPR 313, 327-28, 338 (1998). MSPB
8 members can be removed “by the President only for inefficiency, neglect of duty, or
9 malfeasance in office.” 5 U.S.C. § 1202(d).

10 The NLRB’s Board comprises five members, appointed by the President with
11 the advice and consent of the Senate, who serve staggered terms of up to five years.
12 29 U.S.C. § 153(a). NLRB Board members may be removed only “for neglect of duty
13 or malfeasance in office.” *Id.* In addition to issuing final decisions in unfair-labor-
14 practice cases, the Board also conducts and certifies the outcome of union-
15 representation elections under Section 9 of the Act, and promulgates rules and
16 regulations to carry out the NLRA under Section 6. *Id.* §§ 160(c), 159, 156. But
17 importantly, orders of the Board are not self-enforcing. Section 10(e) of the NLRA
18 provides that the Board must seek enforcement of its orders from an appropriate
19 court of appeals for such orders to become enforceable as judicial injunctions.
20 *Id.* § 160(e). Conversely, any “aggrieved” person may seek to set aside a final Board
21 order in a court of appeals under Section 10(f) of the NLRA. *Id.* § 160(f). Only upon
22 enforcement by a court of appeals does a Board order become fully effective against a
23 respondent. *Dish Network Corp. v. NLRB*, 953 F.3d 370, 375 n.2 (5th Cir. 2020).
24 District courts generally lack jurisdiction to review or supervise these cases. *Miller v.*
25 *Cal. Pac. Med. Ctr.*, 19 F.3d 449, 460 (9th Cir. 1994) (noting “the district court’s lack of
26 jurisdiction over unfair labor practices”).

27 Amazon engages in the retail sale and distribution of consumer goods from its
28 places of business in Palmdale, California. Battle Tested Strategies, LLC (“BTS”) is a

1 delivery business that, in accordance with an Amazon contract, transported packages
2 from Amazon's facility to Amazon's customers. ECF No. 1-1, at 2-4.

3 On April 14, 2023, Amazon informed BTS that it was terminating its contract
4 with BTS as of June 24, 2023. On April 20, 2023, BTS voluntarily recognized
5 Teamsters Joint Council 42 ("the Union") as the exclusive collective-bargaining
6 representative for its delivery drivers and dispatchers at its Palmdale facility. BTS
7 subsequently executed a collective-bargaining agreement with the Union. *Id.* at 6-7.

8 On April 26, 2023, the Union emailed Amazon and requested that Amazon
9 recognize it as the exclusive collective-bargaining representative for BTS's delivery
10 drivers and dispatchers. Amazon has not recognized or bargained with the Union. *Id.*
11 at 7. The Union subsequently filed charges with the NLRB's Region 31 office alleging
12 that, as Amazon is a joint employer with BTS for purposes of collective bargaining,
13 Amazon had violated the NLRA in various ways, including by eliminating a contract
14 to avoid unionization and failing to recognize or bargain with the Union.

15 On September 30, 2024, the General Counsel issued a Complaint alleging that
16 BTS is an agent of Amazon pursuant to Section 2(13) of the NLRA, 29 U.S.C. § 152,
17 and that Amazon is a joint employer. The Complaint further contains a number of
18 allegations of unlawful conduct, including that Amazon failed to recognize and
19 bargain with the Union regarding essential terms and conditions of employment,
20 terminated its contract with BTS without affording the Union an opportunity to
21 bargain over the effects of that termination, and discriminated against union
22 supporters.³ ECF No. 1-1, at 1-12.

23 Amazon filed its Answer to the General Counsel's Complaint on October 15,
24 2024. On November 5, 2024, Amazon filed its Complaint for Declaratory and
25 Injunctive Relief ("Compl.") with this Court. On November 15, Amazon filed its
26 Notice of Motion and Motion for Preliminary Injunction ("Mot."), seeking to enjoin

27 ³ The administrative docket can be found at [https://www.nlr.gov/case/31-CA-](https://www.nlr.gov/case/31-CA-317349)
28 317349.

1 the NLRB’s administrative proceeding. Amazon alleges that the removal protections
2 for NLRB Board members and ALJs are unconstitutional. Compl. ¶¶ 33-41, 50-55;
3 Mot. 4-10.

4 **LEGAL STANDARD**

5 “A preliminary injunction is an extraordinary and drastic remedy” that should
6 “never [be] awarded as of right.” *Munaf v. Geren*, 553 U.S. 674, 689–90 (2008) (citation
7 omitted). A plaintiff must make “a clear showing” that it is “entitled to such relief.”
8 *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008) (citation omitted). To make
9 that showing, a plaintiff must establish “that [it] is likely to succeed on the merits, that
10 [it] is likely to suffer irreparable harm in the absence of preliminary relief, that the
11 balance of equities tips in [its] favor, and that an injunction is in the public interest.”
12 *Winter*, 555 U.S. at 20. The third and fourth factors of the preliminary injunction
13 analysis—harm to others and the public interest—“merge when the Government is
14 the opposing party.” *Nken v. Holder*, 556 U.S. 418, 435 (2009). To obtain a preliminary
15 injunction, a plaintiff must satisfy all four prongs. *All. for the Wild Rockies v. Cottrell*, 632
16 F.3d 1127, 1135 (9th Cir. 2011).

17 **ARGUMENT**

18 **A. Congress has jurisdictionally barred injunctive relief in cases** 19 **involving or growing out of labor disputes.**

20 Absent a statutory exception, Congress has jurisdictionally barred all “court[s]
21 of the United States” from issuing injunctions or TROs “in any case involving or
22 growing out of any labor dispute,” 29 U.S.C. § 107, where such injunction would be
23 contrary to the public policy in favor of self-organization, collective bargaining, and
24 concerted activity by employees for mutual aid or protection, *id.* § 102; *see generally id.*
25 § 101 *et seq.* (Norris-LaGuardia Act); *Boys Markets, Inc. v. Retail Clerks Union*, 398 U.S.
26 235, 253 (1970). This case unquestionably “grow[s] out of” a labor dispute, which
27 includes “any controversy . . . concerning the association or *representation* of persons in
28 negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of

1 employment.” 29 U.S.C. § 113 (emphasis added). That standard is clearly met: the
2 current proceeding stems directly from Amazon’s refusal to bargain with employees’
3 chosen representative. As such, that controversy comes within Norris-LaGuardia’s
4 definition of “labor dispute.” 29 U.S.C. § 113(c). That scope is clear, broad, and
5 admits no non-statutory exception. *See Jacksonville Bulk Terminals, Inc. v. Int’l*
6 *Longshoremen’s Ass’n*, 457 U.S. 702, 711 (1982); *United Steelworkers v. Bishop*, 598 F.2d
7 408, 414 (5th Cir. 1979).⁴ This is, in other words, the type of dispute Congress
8 intended to be free from the overweening influence of federal injunctions.

9 Second, even if this case fell within the narrow set of circumstances in which
10 any sort of injunction could ever issue in connection with a labor dispute, Amazon
11 would need to show, not merely ordinary irreparable injury, but “substantial and
12 irreparable injury to complainant’s property.” *VHS Acquisition Subsidiary No. 7 v.*
13 *NLRB*, No. 1:24-cv-02577, 2024 WL 4817175, at *(D.D.C. Nov. 17, 2024) (explaining
14 the series of steps a court would have to take before finding that an injunction could
15 issue in a case involving and growing out of a labor dispute under Norris-La Guardia).
16 As more fully outlined below in Section II(B), Amazon cannot show that any
17 irreparable injury will befall either itself or its “property.” By the same token, Norris-
18 LaGuardia’s strictures preclude relief where a complainant “has failed to make every
19 reasonable effort to settle such dispute either by negotiation or with the aid of any
20 available governmental machinery of mediation or voluntary arbitration.” 29 U.S.C.
21 § 108. *See BNSF Ry. Co. v. Int’l Ass’n of Sheet Metal Workers—Transp. Div.*, 973 F.3d 326,
22 342 (5th Cir. 2020) (failure to pursue “administrative avenue” under Railway Labor
23 Act precluded injunction). Amazon’s failure to exhaust administrative processes here
24 is fatal to its claims.

25 ⁴ The Supreme Court’s decision in *Axon Enterprise, Inc. v. FTC*, 598 U.S. 175 (2023),
26 does not affect Norris-LaGuardia’s explicit jurisdictional bar, as *Axon*’s reasoning is
27 limited to implicit bars. *See, e.g., Moats v. Nat’l Credit Union Admin. Board*, No. 3:23-cv-
28 147, 2024 WL 1724271, at *2-4 (S.D. Tex. Apr. 9, 2024), *appeal docketed*, No. 24-40259
(5th Cir. Apr. 22, 2024).

B. Amazon is not likely to succeed on any of its claims.

1. Failure to allege causal harm dooms Amazon's removal claims.

Amazon has made no effort to allege, much less produce evidence, that the statutes restricting the removal of ALJs and Board members actually cause it harm. Supreme Court precedent renders these challenges hopelessly flawed.

In *Collins v. Yellen*, 594 U.S. 220 (2021), the Supreme Court made clear that removal-restriction problems are materially distinct from officer-appointment problems. The Court held that when an official is “properly *appointed*,” there is no claim that he “exercise[d]...power that [he] did not lawfully possess,” and thus, “there is no reason to regard any of the actions taken...as void.” *Id.* at 257-58. The Court explained that a showing of an infirm removal provision, in the abstract, is not enough to void agency action; rather, a plaintiff must show that the removal provision “cause[d] harm” to them, *e.g.*, if “the President had made a public statement expressing displeasure with actions taken by a Director and had asserted that he would remove the Director if the statute did not stand in the way.” *Id.* at 259–60.

Consistent with *Collins v. Yellen*, every circuit court to have considered what plaintiffs need to show to obtain relief on removal-protection claims has held that they must show causal harm. *See, e.g., CFPB v. CashCall, Inc.*, 35 F.4th 734, 742–43 (9th Cir. 2022) (at minimum, challenger must show how unconstitutional removal provision actually caused harm); *Leachco, Inc. v. CPSC*, 103 F.4th 748, 757–58 (10th Cir. 2024) (declining to enjoin pending administrative proceeding due to lack of causal harm), *petition for cert. filed*, No. 24-156 (Aug. 9, 2024); *K & R Contractors, LLC v. Keene*, 86 F.4th 135, 149 (4th Cir. 2023) (challenger must show causal harm to obtain relief); *CFPB v. L. Offs. of Crystal Moroney, P.C.*, 63 F.4th 174, 180 (2d Cir. 2023) (similar), *cert. denied*, 144 S. Ct. 2579 (2024); *Cnty. Fin. Servs. Ass’n of Am., Ltd. v. CFPB*, 51 F.4th 616 (5th Cir. 2022) (“*CFSA*”) (similar), *rev’d and remanded on other grounds*, 601 U.S. 416 (2024), *reinstating opinion in relevant part*, 104 F.4th 930 (5th Cir. 2024); *Calcutt v. FDIC*, 37 F.4th 293, 318–20 (6th Cir. 2022) (similar), *rev’d per curiam on other grounds*, 598 U.S.

1 623 (2023). Courts have also repeatedly rejected arguments that *Collins*’s causal-harm
2 standard applies to only retrospective relief. *See, e.g., Leachco*, 103 F.4th at 757 (citing
3 *Crystal Moroney*, 63 F.4th at 180–81; *CFS A*, 51 F.4th at 631; *Calcutt*, 37 F.4th at 316
4 (explaining that *Collins*’s remedial “inquiry focuses on whether a harm occurred that
5 would create an entitlement to a remedy, rather than the nature of the remedy”); *accord*
6 *YAPP USA Auto. Sys., Inc. v. NLRB*, No. 24-12173, 2024 WL 4119058, at *4–10
7 (E.D. Mich. Sept. 9, 2024), *motion for injunction pending appeal denied*, No. 24-1754, 2024
8 WL 4489598, at *3–5 (6th Cir. Oct. 13, 2024) (applying *Collins* causal-harm standard),
9 *application for writ of injunction denied*, No. 24A348, 2024 WL 4508993 (U.S. Oct. 15,
10 2024) (Kavanaugh, J. in chambers).

11 Given the high burden this standard creates, it is not surprising that courts
12 faced with this analysis have repeatedly denied injunctions sought on removability
13 grounds. *See, e.g., Leachco*, 103 F.4th at 765 (challenge to CPSC commissioners’ and
14 ALJs’ removal protections); *Burgess v. FDIC*, 639 F. Supp. 3d 732, 747 (N.D. Tex.
15 2022) (FDIC Board of Directors and ALJs), *appeal docketed sub nom. Burgess v. Whang*,
16 No. 22-11172 (5th Cir. Dec. 5, 2022). Within the last five weeks, two district judges
17 within this Circuit have denied preliminary injunctions to halt NLRB proceedings on
18 removability grounds because each challenger failed to show causal harm. *See Ares*
19 *Collective Grp. LLC v. NLRB*, No. CV-24-00517-TUC-SHR, 2024 WL 4581436, at *2
20 (D. Ariz. Oct. 25, 2024) (“merely highlighting” existence of two-layer removal system
21 “does not establish the causal link”); *HonorHealth v. NLRB*, No. CV-24-03009-PHX-
22 DJH, 2024 WL 4769772, at *3-4 (D. Ariz. Nov. 13, 2024) (following *Ares*). The law is
23 thus settled: “a party challenging agency action must show not only that the removal
24 restriction transgresses the Constitution’s separation of powers but also that the
25 unconstitutional provision caused (or would cause) them harm.” *Collins v. Dep’t of*
26 *Treasury*, 83 F.4th 970, 982 (5th Cir. 2023) (cleaned up).

27 Amazon has made no effort to meet this standard. This alone suffices to deny
28 its request for preliminary relief. *See Cortes v. NLRB*, No. 1:23-cv-02954, 2024 WL

1 1555877, at *7 (D.D.C. Apr. 10, 2024) (dismissing similar lawsuit because “the Court
2 could ‘dispose of the case’ on the harm requirement” (quoting *Bond v. United States*,
3 572 U.S. 844, 855 (2014))), *appeal docketed*, No. 24-5152 (D.C. Cir. June 10, 2024); *see*
4 *also Kerwin v. Trinity Health Grand Haven Hosp.*, No. 1:24-cv-445, 2024 WL 4594709, at
5 *4–5 (W.D. Mich. Oct. 25, 2024) (rejecting removal challenge primarily on “threshold
6 matter” of causal harm), *appeal docketed*, No. 24-1975 (6th Cir. Nov. 5, 2024).⁵
7 Accordingly, Amazon’s removal claims are fit for dismissal, not the award of an
8 extraordinary remedy.⁶

9 2. Amazon’s Board member removal claims are contrary to precedent.

10 Amazon alleges that Board members are unconstitutionally insulated from
11 removal by the President. Mot. 4-7. This argument, however, is foreclosed by
12 *Humphrey’s Executor v. United States*, 295 U.S. 602 (1935). In that decision, the Supreme
13 Court held that members of the Federal Trade Commission (FTC), who were part of
14 a multi-member decisionmaking body of experts, could be constitutionally insulated
15 from removal by the President. *Id.* at 630-32. The Court reasoned that Congress’s
16 grant of tenure protections was constitutional and did not interfere with the
17 President’s authority because FTC commissioners performed “quasi-legislative and
18 quasi-judicial functions.” *Id.* at 629. Relying on *Humphrey’s Executor*, Congress created
19 the NLRB less than two months after that decision and modeled it after the FTC. *See*
20 H.R. Rep. 74-1371, at 4 (1935) (stating that the NLRB “is to have a similar status to
21 that of the Federal Trade Commission” and describing express removal protections
22 for Board members as “desirable in the light of” *Humphrey’s Executor*), *reprinted in*, 2

23
24 ⁵ Even assuming arguendo that this Court finds removal protections for ALJs and
25 Board members to be unconstitutional, the proper remedy would be severance, not an
26 injunction. *See Space Expl. Techs. Corp. v. Bell*, 701 F. Supp. 3d 626, 635 (S.D. Tex.
27 2023) (withholding preliminary relief on removability grounds for this reason).

28 ⁶ As we address below at pp. 18, *Axon Enterprises, Inc. v. FTC*, 598 U.S. 174 (2023),
does not alter this analysis. That decision addressed solely jurisdiction, not entitlement
to injunctive relief.

1 NLRB, Legislative History of the National Labor Relations Act, 1935, at 3255 (1949).

2 The *Humphrey's* Court identified features like the FTC commissioners' seven-
3 year, staggered terms as evidence of Congress's intent to "create a body of experts
4 who shall gain experience by length of service," which "would not be subject to
5 complete change at any one time." 295 U.S. at 624–25. The core holding of
6 *Humphrey's Executor* therefore recognizes that—at the very least—Congress can
7 insulate members of commissions like the FTC from unencumbered presidential
8 removal. See *Wiener v. United States*, 357 U.S. 349 (1958) (inferring removal protections
9 for members of the War Claims Commission).

10 No circuit court has ever struck down removal protections for officers serving
11 on a multimember commission. See *Leachco*, 103 F.4th at 760–63 (upholding removal
12 protections identical to those of Board members belonging to the heads of the
13 Consumer Product Safety Commission); *Consumers' Rsch. v. Consumer Prod. Safety*
14 *Comm'n*, 91 F.4th 342, 352 (5th Cir. 2024) (holding that the *Humphrey's Executor*
15 rationale broadly "protects any 'traditional independent agency headed by a
16 multimember board'" (quoting *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 591 U.S.
17 197, 207 (2020)), *cert. denied*, No. 23-1323, 2024 WL 4529808 (Oct. 21, 2024). "The
18 organizational features of the NLRB match the profile of an agency that fits within
19 the parameters of the *Humphrey's Executor* removal exception." *Alivio Med. Ctr. v.*
20 *Abruzzo*, No. 24-cv-7217, 2024 WL 4188068, at *7 (N.D. Ill. Sept. 13, 2024).

21 Amazon contends that because Board members "wield substantial executive
22 power," *Humphrey's Executor* does not apply. Mot. 5-6. This position is tantamount to
23 saying that *Seila Law LLC v. CFPB*, 591 U.S. 197 (2020), upended decades of
24 precedent and practice by supplanting *Humphrey's Executor* with a new legal rule that
25 allows principal officers serving on multi-member boards or commissions to receive
26 removal protections only if they do not exercise "substantial executive power." Not
27 so.

28 First, *Seila Law* expressly disavowed that it was disturbing any of the Court's

1 prior precedents. It did “not revisit . . . prior decisions allowing certain limitations on
2 the President’s removal power,” *id.* at 204, or “revisit *Humphrey’s Executor* or any other
3 precedent today,” *id.* at 228; *see also FTC v. Grand Canyon Educ., Inc.*, --- F. Supp. 3d ---,
4 No. CV-23-02711-PHX-DWL, 2024 WL 3825087 (D. Ariz. Aug. 15, 2024) (rejecting
5 similar effort to cast *Seila Law* as a gamechanger).

6 Second, *Seila Law* suggested that one possible cure to the constitutional
7 problem created by the CFPB’s tenure-protected, single-director structure was
8 converting the CFPB to a multimember agency. *Seila Law*, 591 U.S. at 237. That
9 makes perfect sense if *Humphrey’s Executor* remains binding. But it makes no sense on
10 Amazon’s view, because the CFPB undoubtedly “wields significant executive power.”
11 *Seila Law*, 591 U.S. at 205-207 (cataloguing authorities).

12 Simply put, as the Fifth Circuit broadly held in *Consumers’ Research, Humphrey’s*
13 *Executor* “still protects *any* ‘traditional independent agency headed by a multimember
14 board.’” 91 F. 4th at 352 (quoting *Seila Law*, 591 U.S. at 207) (emphasis added).
15 Notably, the *Consumers’ Research* court found that the Consumer Product Safety
16 Commission (CPSC) “exercises substantial executive power (in the modern sense),”
17 *id.* at 353-45, and listed relevant examples of such power, *id.* at 346 (cataloguing
18 authorities). Nonetheless, the Fifth Circuit found that those powers did not affect the
19 validity of the CPSC commissioners’ removal protections.⁷ It recognized that applying

21 ⁷ In comparison, the Board’s authority is significantly less robust. Although the Board
22 also has rulemaking authority, it cannot initiate administrative proceedings, seek civil
23 monetary penalties, or provide any other form of nonremedial relief. 29 U.S.C.
24 § 160(a), (c). In addition, the Board’s orders are not self-enforcing. *Dish Network*, 953
25 F.3d at 375 n.2. As such, the justification for upholding the removal protections at
26 issue here is at least as strong as it was in *Consumers’ Research*. And to the extent
27 Amazon relies on the Board’s circumscribed role in exercising “prosecutorial” powers
28 by authorizing the General Counsel from time to time to seek temporary injunctive
relief in district court under Section 10(j) of the Act, 29 U.S.C. § 160(j), [Mot. 5], that
argument is foreclosed by controlling precedent. *See FTC v. Am. Nat’l Cellular, Inc.*, 810
F.2d 1511, 1513-14 (9th Cir. 1987) (rejecting argument that FTC’s ability to seek

1 a “substantial executive power” standard—identical to the one Amazon presses
2 here—would effectively overrule *Humphrey’s Executor*, which lower federal courts
3 simply cannot do. 91 F.4th at 353–55.

4 Amazon feebly tries to distinguish *Humphrey’s Executor* on the basis that the
5 NLRA omits “inefficiency” as a ground for removing Board members. Mot. 6-7. But
6 the Fifth Circuit recently upheld identical removal protections in *Consumers’ Research*,
7 91 F.4th at 346, 352 (reviewing statutory language and remarking that CPSC and FTC
8 “are twins” because commissioners of both agencies can be removed only for cause),
9 as did the Tenth Circuit in *Leachco*, 103 F.4th at 761, 763. As the Eastern District of
10 Michigan recently noted, legal scholars have explained that “the absence of
11 ‘inefficiency’ as a ground for removal does not unconstitutionally interfere with the
12 President’s authority.” *YAPP*, 2024 WL 4119058, at *6 n.4 (citing Jane Mannings &
13 Lev Menand, *The Three Permissions: Presidential Removal and the Statutory Limits of Agency*
14 *Independence*, 121 Colum. L. Rev. 1, 8, 69 (2021)).

15 3. NLRB ALJs’ removal protections are constitutional under binding and
16 persuasive precedent

17 Respondent has not shown the necessary harm traceable to ALJs’ removal
18 protections. But it would lose even if it could do so, because under controlling
19 precedent, ALJs are not the type of inferior officers of the United States with
20 policymaking or prosecutorial responsibilities that must be removable at the will of
21 their appointing authorities in order to protect Presidential authority under Article II.

22 The Supreme Court has long held that subordinate officials within the
23 Executive Branch, a category which includes “inferior officers” like ALJs, *see Seila*, 591

24
25 injunctive relief—which it gained after *Humphrey’s Executor* was decided—meant that
26 *Humphrey’s Executor* was not controlling). Amazon’s assertion [Mot. 5] that the Board
27 wields significant executive power through its ability to issue subpoenas meets a
28 similar roadblock; the FTC enjoys the same power. *See* 15 U.S.C. § 49.

1 U.S. at 207, can be afforded a measure of protection from removal without
2 unconstitutionally impairing the President’s powers under Article II of the
3 Constitution. Like all ALJs, NLRB ALJs are afforded a measure of decisional
4 independence through a statutory provision that allows ALJs across the Executive
5 Branch to be removed from office only upon a showing of “good cause.” 5 U.S.C. §
6 7521(a). The “good cause” removal protection that Congress has afforded to ALJs,
7 including the one who will be assigned to Amazon’s unfair-labor-practice case, is
8 consistent with the precedents discussed below.

9 In *United States v. Perkins*, 116 U.S. 483 (1886), a Naval inferior officer
10 challenged his for-cause removal as unlawful, as Congress had provided that such
11 inferior officers could be removed in peacetime only pursuant to a court-martial
12 sentence. *Id.* at 483-84. The Supreme Court agreed, holding that it “ha[d] no doubt”
13 that Congress “may limit and restrict the power of removal” for inferior officers. *Id.*
14 And in *Morrison v. Olson*, 487 U.S. 654 (1988), the Court upheld a “good cause”
15 removal restriction for an independent counsel appointed to investigate and prosecute
16 serious crimes committed by certain high-ranking executive officers. *Id.* at 685-93.
17 Through that removal authority, the Court stated, the President “retains ample
18 authority to assure that the counsel is competently performing his or her statutory
19 responsibilities.” *Id.* Although the independent counsel exercised “discretion and
20 judgment” in carrying out his responsibilities, the Court concluded that “the
21 President’s need to control the exercise of that discretion [was not] so central to the
22 functioning of the Executive Branch as to require as a matter of constitutional law
23 that the counsel be terminable at will by the President.” *Id.* at 691-92.

24 Congress does not have unlimited authority to shield officials wielding
25 executive power from removal. It cannot impose any restriction that prevents the
26 President from ensuring that the laws are faithfully executed or “deprive[s] the
27 President of adequate control” over the official’s exercise of executive power. *Free*
28 *Enter. Fund*, 561 U.S. at 508; *see also Morrison*, 487 U.S. at 658. But within those bounds,

1 Congress may regulate the conditions for removal of inferior officers.

2 Here, the statute affording ALJs a measure of removal protection satisfies
3 constitutional requirements. Congress created ALJs as “semi-independent subordinate
4 hearing officers” within agencies. *Ramspeck v. Fed. Trial Exam’rs Conf.*, 345 U.S. 128,
5 132 (1953) (cleaned up). Simultaneously, Congress sought to ensure that “agenc[ies]
6 retain[] full power over policy.” 2 Paul R. Verkuil et al., *Administrative Conference of*
7 *the United States, Recommendations and Reports: The Federal Administrative Judiciary*
8 803 (1992). The Administrative Procedure Act accordingly gives agencies plenary
9 power to reverse ALJs’ decisions. *See* 5 U.S.C. § 557(b). And under Section 7521(a)’s
10 “good cause” standard, an ALJ can be removed for refusing to follow binding legal or
11 policy judgments announced by the Board.

12 Consistent with that design, the regulations governing NLRB adjudications
13 assure that the five-seat Board is ultimately responsible for setting policy. The ALJ
14 conducts an administrative hearing, *see* 29 C.F.R. §§ 102.34-.35, and issues a decision
15 containing factual and legal determinations regarding whether a violation has
16 occurred, as well as a recommended order, *id.* § 102.45(a). But, crucially, the ALJ’s
17 order is not a final agency order until the Board has had an opportunity to hear and
18 resolve any party’s exceptions to the ALJ’s “decision or to any other part of the
19 record or proceedings (including rulings upon all motions or objections).” *Id.* §
20 102.46(a); *see id.* § 102.48. And even if no exceptions are filed, the Board may
21 nonetheless modify the judge’s recommended order to conform to the Board’s current
22 remedial practices. *See, e.g., Cooling for Less*, 2014 WL 1871305, at *1 n.1. Even an ALJ’s
23 interlocutory orders can be immediately reviewed by the Board. *See id.* § 102.26.
24 Finally, as ALJ decisions are not precedential, there is no risk that an ALJ will set
25 policy even if the parties decline to seek Board review. *NY Paving, Inc.*, 2022 WL
26 4546315, at *6 n.11.

27 This design comports with constitutional requirements, as several courts of
28 appeals have confirmed. *See Decker Coal v. Pebringer*, 8 F.4th 1123, 1129–36 (9th Cir. 2021)

1 (holding that Congress could grant tenure protections to Department of Labor
2 (DOL) ALJs); *Calcutt*, 37 F.4th at 319–20 (Federal Deposit Insurance Corporation
3 ALJs); *Leachco*, 103 F.4th at 764 (Consumer Product Safety Commission ALJs). The
4 only Circuit to hold otherwise is the Fifth Circuit, in *Jarkesy v. SEC.* 34 F.4th 446, 463
5 (5th Cir. 2022), *aff’d on other grounds*, 144 S. Ct. 2117 (2024).

6 Amazon’s challenge to NLRB ALJs’ removal protections hinges on whether it
7 can establish that removal protections for NLRB ALJs “deprive[s] the President of
8 adequate control” over the official’s exercise of executive power. *Free Enter. Fund*, 561
9 U.S. at 508. In support, Amazon points to *Free Enterprise Fund*, a cramped reading of
10 *Decker Coal*, and a handful of out-of-circuit, non-binding decisions, Mot. 7-9. These do
11 not remotely suffice to show that longstanding protections for ALJs against arbitrary
12 removal are unconstitutional.

13 Turning first to *Free Enterprise*, Amazon claims that, as the two-layer removal
14 protections afforded to the Public Company Accounting Oversight Board
15 (“PCAOB”) in *Free Enterprise* were unconstitutional, so too must be the two-layer
16 removal protections for NLRB ALJs. Mot. 8. But Amazon is wrong in critical
17 respects. As the Ninth Circuit recognized in *Decker Coal*, *Free Enterprise* “did not
18 broadly declare all two-level for-cause protections for inferior officers
19 unconstitutional.” 8 F.4th at 1132. Rather, *Free Enterprise* held unconstitutional the
20 “highly unusual” and “sharply circumscribed” dual-layer removal protections of the
21 leadership of a regulatory body with policymaking and enforcement powers, 561 U.S.
22 at 505, while expressly noting that its holding “does not address” ALJs. *Id.* at 507
23 n.10. But this does not mean that *Free Enterprise* did not provide guidance as to the
24 essential differences between ALJs and PCAOB. As the Supreme Court noted,
25 “unlike members of the [PCAOB], many administrative law judges of course perform
26 adjudicative rather than enforcement or policymaking functions or possess purely
27 recommendatory powers.” 561 U.S. at 507 n.10 (internal citation omitted).

28 Amazon weakly tries to distinguish *Decker Coal* on the basis that the NLRB is

an independent, rather than executive, agency. Mot. 9-10. But two factors that the *Decker Coal* court pointed to—that DOL ALJs exercise “purely adjudicatory functions” and are not subject to “unusually high” removal restrictions that posed “an even more serious threat to executive control” in *Free Enterprise*, 561 U.S. at 477, 503—are identical to the facts of the instant case. NLRB ALJs, like DOL ALJs, do not exercise “policy making and enforcement functions.” 8 F.4th at 1133. *Decker Coal* also noted that DOL ALJs “cannot sua sponte initiate investigations or commence a . . . case,” and that Congress did not “mandate[] that the DOL employ ALJs in adjudicating” administrative cases. 8 F.4th at 1133. The same reasoning applies to NLRB ALJs. *See* 29 U.S.C. §§ 153(d), 160(b). And NLRB ALJs, like DOL ALJs, are protected by the same “ordinary ‘good cause’ standard,” *Decker Coal*, 8 F.4th at 1135, established by 5 U.S.C. § 7521(a). It is for these reasons that the Tenth Circuit, applying *Decker Coal* as persuasive authority, upheld the constitutionality of two-layer removal protections for Consumer Product Safety Commission (“CPSC”) ALJs because, in addition to only possessing adjudicatory authority and ordinary good-cause protections, the CPSC could forego use of CPSC ALJs entirely. *See Leachco*, 103 F.4th at 764; *see also Calcutt*, 37 F.4th at 320 (explaining that the permissibility of ALJs’ removal protections “centers on their status as adjudicatory officials that issue non-final recommendations to an agency, and not on how many levels of removal protections they enjoy”).⁸ The Board can also forego the use of ALJs entirely. *See* 29 U.S.C. § 160(b) (permitting the Board, a member of the Board, or an agent of the Board to hear cases).

Amazon’s reliance on *Jarkesy v. SEC*, 34 F.4th 446 (5th Cir. 2022), *aff’d on other*

⁸ This is also the conclusion reached by several federal district courts outside the Fifth Circuit that have reviewed NLRB ALJ removal protections. *See YAPP*, 2024 WL 4119058, at *8 (“NLRB ALJs perform purely adjudicatory functions, issue non-final recommendations to the NLRB, and enjoy good-cause protections that are a ‘lesser impingement’ than . . . in *Free Enterprise Fund*.”); *Alivio Med. Ctr. v. Abruzzo*, No. 24-cv-7217, 2024 WL 4188068, at *11 (N.D. Ill. Sept. 13, 2024) (following *YAPP*).

1 grounds, 144 S. Ct. 2117 (2024), and two district court opinions from within the Fifth
2 Circuit that followed *Jarkesy*, is misplaced. Mot. 8-9. Those non-binding, out-of-circuit
3 decisions are contrary to *Decker Coal*, which, as noted above, upheld the very same
4 removal restrictions applied to a similar context. 8 F.4th at 1130, 1136; *see also Jarkesy*,
5 34 F.4th at 478 (Davis, J., dissenting) (“The majority’s decision [on the
6 constitutionality of ALJ removal protections] is in tension, if not direct conflict, with
7 *Decker Coal*.”). And they are unpersuasive on their own merits; they do not explain *why*
8 the President needs to be able to remove adjudicative factfinders who have no
9 policymaking functions, and indeed neither can Amazon.

10 NLRB ALJ removal protections cannot be said to “impede the President's
11 ability to perform his constitutional duty.” *Morrison*, 487 U.S. at 691. NLRB ALJs do
12 not prosecute cases, the Board may forego use of ALJs entirely or review any element
13 of an NLRB ALJ decision or remedy, and ALJs whom the President wishes to
14 remove are subject to “an ordinary ‘good cause’ standard,” *Decker Coal*, 8 F.4th at
15 1135. Amazon’s argument fails utterly. For these reasons, Congress has
16 constitutionally provided a modicum of protection to NLRB ALJs. This is also the
17 conclusion reached by several federal district courts outside the Fifth Circuit that have
18 reviewed NLRB ALJ removal protections. See *YAPP*, 2024 WL 4119058, at *8 (“In
19 sum, NLRB ALJs perform purely adjudicatory functions, issue non-final
20 recommendations to the NLRB, and enjoy good-cause protections that are a ‘lesser
21 impingement’ than the removal standard at issue in *Free Enterprise Fund*”); *Alivio Med.*
22 *Ctr. v. Abruzzo*, No. 24-cv-7217, 2024 WL 4188068, at *11 (N.D. Ill. Sept. 13, 2024)
23 (following *YAPP*).

24 **C. Amazon has not met its burden to show irreparable harm.**

25 The Supreme Court has repeatedly stated that the “basis of injunctive relief in
26 the federal courts has always been irreparable harm and inadequacy of legal remedies.”
27 *Sampson v. Murray*, 415 U.S. 61, 88 (1974). Amazon has failed to establish that it is
28 “likely to suffer imminent, irreparable harm absent an injunction.” *Bennett v. Isagenix*

1 *Int'l LLC*, 118 F.4th 1120, 1126 (9th Cir. 2024).

2 Amazon primarily bases its claim of irreparable harm on the notion that *Axon*
3 *Enterprise, Inc. v. FTC*, 598 U.S. 175 (2023), makes such proof unnecessary. Mot. 11-12.
4 But *Axon* did not address injunctive relief and does not bear on the question of
5 irreparable harm. Rather, the narrow question decided in *Axon* was whether a district
6 court had jurisdiction to hear structural constitutional challenges to ongoing agency
7 proceedings. *See Leachco*, 103 F.4th at 759 (“[W]e will not misunderstand what was said
8 about jurisdiction in *Axon* ‘as a holding on a party’s entitlement to relief based on an
9 unconstitutional removal provision.’”) (quoting *Collins*, 594 U.S. at 258 n.24); *Alpine*
10 *Sec. Corp. v. FINRA*, --- F. 4th ---, 2024 WL 4863140, at *15–16 (D.C. Cir. Nov. 22,
11 2024) (“*Axon* answered a statutory jurisdictional question [T]he Court did not
12 speak to what constitutes irreparable harm for . . . a preliminary injunction.”); *accord*
13 *YAPP*, 2024 WL 4489598, at *3 (*Axon* Court “did not address the merits of [the
14 removal protection] claims, but rather assessed whether federal courts have *jurisdiction*
15 to hear the claims on their merits”) (cleaned up).

16 Amazon also cannot establish irreparable harm based solely on the fact that its
17 claims are constitutional in nature. *Contra* Mot. 11. To the extent that any such
18 presumption exists in the Ninth Circuit, Amazon would first have to show that it is
19 likely to succeed on the merits of its constitutional claims, which it has not. *See Baird v.*
20 *Bonta*, 81 F.4th 1036, 1046-48 (9th Cir. 2023) (courts “need not consider the other
21 factors if a movant fails to show a likelihood of success on the merits”) (cleaned up).
22 Additionally, other courts have been hesitant to apply any such presumption broadly,
23 and have often limited it to constitutional claims involving First Amendment and
24 personal privacy rights, not the more abstract injuries Amazon alleges here.⁹ *See Siegel*

25 _____
26 ⁹ Plaintiffs’ cited authorities are not to the contrary. Mot. 11-12. *Nelson v. National*
27 *Aeronautics & Space Administration*, 530 F.3d 865, 877-81 (9th Cir. 2008), involved a
28 challenge based on government contractors’ right to informational privacy. That case,
in turn, relied on a decision concerning an alleged Equal Protection Clause violation.

1 *v. Lepore*, 234 F.3d 1163, 1178 (11th Cir. 2000) (“The only areas of constitutional
2 jurisprudence where . . . an on-going violation may be presumed to cause irreparable
3 injury involve the right of privacy and certain First Amendment claims [.]”); *Pub. Serv.*
4 *Co. of N.H. v. Town of W. Newbury*, 835 F.2d 380, 382 (1st Cir. 1987) (findings of
5 irreparable harm based solely on a constitutional violation “are almost entirely
6 restricted to cases involved alleged infringement of free speech, association, privacy or
7 other [similar] rights”). Indeed, any presumption of harm in constitutional cases
8 should be narrow to ensure that each of the four preliminary-injunction factors be
9 given effect. *See Del. State Sportsmen’s Ass’n, Inc. v. Del. Dep’t of Safety & Homeland Sec.*,
10 108 F.4th 194, 202 (3d Cir. 2024). To say that irreparable harm “usually” exists where
11 a constitutional plaintiff is likely to succeed, *Baird*, 81 F.4th at 1040, does not relieve
12 plaintiffs of their burden to show that their case is indeed “usual”—and Amazon does
13 not even attempt to do so here.

14 **D. The public interest and the balance of the equities disfavor an**
15 **injunction.**

16 Amazon also cannot show that its alleged harm outweighs the harm an
17 injunction would inflict on the public and those not before the Court. “[G]reat
18 weight” should be given to “the fact that Congress already declared the public’s
19 interest and created a regulatory and enforcement framework.” *In re Sac & Fox Tribe of*
20 *Mississippi in Iowa/Meskwaki Casino Litig.*, 340 F.3d 749, 760 (8th Cir. 2003). Through
21 the NLRA, Congress empowered the NLRB to initially adjudicate and, where
22 appropriate, remedy unfair labor practices to “safeguard[] commerce from injury.” 29
23 U.S.C. § 151; *see UAW Loc. 283 v. Scofield*, 382 U.S. 205, 220 (1965). The effects of an
24 injunction would be especially severe here since the NLRB’s administrative

25 _____
26 *Id.* at 882 (citing *Monterey Mech. Co. v. Wilson*, 125 F.3d 702, 715 (9th Cir. 1997)).
27 Similarly, the plaintiff in *Cuviello v. City of Vallejo*, 944 F.3d 816, 833 (9th Cir. 2019),
28 alleged a First Amendment and state law free speech violation. None of these cases
implicates a broad-based injury similar to the one Amazon alleges here, which would
be suffered by every respondent to an NLRB unfair-labor-practice proceeding.

1 procedures are the sole mechanism for enforcing the rights the NLRA creates,
2 *Nathanson v. NLRB*, 344 U.S. 25, 27 (1953). Depriving Amazon’s employees—the
3 victims of the alleged ULPs—of their only avenue to vindicate their NLRA rights
4 cannot serve the public interest, especially where Plaintiff may obtain an adequate
5 remedy in a court of appeals if the Board ultimately issues an adverse decision. *See, e.g.,*
6 *Ares*, 2024 WL 4581436, at *2 (“Even assuming the two-layer removal system could
7 cause a per se harm to Plaintiffs, this harm can be completely extinguished by the
8 court of appeals vacating an ALJ’s decision.”).

9 Additionally, granting Amazon’s Motion for Preliminary Injunction would
10 necessarily delay, if not outright preclude, resolution of the underlying ULPs in this
11 case. A delay would be particularly damaging here, where the ULP complaint alleges
12 Amazon has failed to recognize and bargain with the Union. Courts have long
13 recognized that delays in initial contract bargaining cause irreparable harm to
14 employees and the certified union. *E.g., Fall River Dyeing & Finishing Corp. v. NLRB*,
15 482 U.S. 27, 49–50 (1987) (employer’s refusal to bargain “disrupts the employees’
16 morale, deters their organizational activities, and discourages membership in unions.”)
17 (quotation omitted); *cf. Small v. Avanti Health Sys., LLC*, 661 F.3d 1180, 1192 (9th Cir.
18 2011) (“a delay in bargaining weakens support for the union, and a Board order
19 cannot remedy this diminished level of support.”). So, while Amazon stands to
20 benefit from having the enforcement of the NLRA halted, the hidden costs it shifts
21 onto others should not be lightly case aside. As the Northern District of Illinois
22 recently put it, Amazon’s “position—if accepted—would neuter the [NLRA] by
23 blocking all proceedings before the [NLRB], the independent agency that has
24 steadfastly and exclusively enforced the statute for the past eighty-nine years against
25 entities accused of unfair labor practices. Quite extraordinary, indeed.” *Alivio*, 2024
26 WL 4188068, at *11. Extraordinary—and totally unjustified.

CONCLUSION

This Court should deny Amazon's request for injunctive relief.

Respectfully submitted,

NATIONAL LABOR RELATIONS
BOARD

*Contempt, Compliance, and
Special Litigation Branch*

NATIONAL LABOR RELATIONS
BOARD

Region 31

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Dated Nov. 27, 2024

1 UNITED STATES DISTRICT COURT
2 CENTRAL DISTRICT OF CALIFORNIA
3

4 AMAZON.COM SERVICES LLC and
5 AMAZON LOGISTICS, INC.,
6

7 Plaintiffs,

8 v.

Case No. 2:24-cv-09564-SPG-MAA

9
10 NATIONAL LABOR RELATIONS
11 BOARD, *et al.*,
12

13 Defendants.

14 CERTIFICATE OF COMPLIANCE

15 I hereby certify that the above document complies with the type-volume
16 limitation of L.R. 11-6.1, as it contains 6,988 words excluding those exempted by that
17 rule, and L.R. 11-3.1.1, as it was prepared by Microsoft Word for Office 365 in
18 proportionally-spaced, 14-point Garamond font.

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20 /s/ Paul A. Thomas
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